UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MIRENA PRODUCTS LIABILITY LITIGATION,

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White Plains, N.Y.
August 14, 2013
9:45 a.m.

Before:

HON. CATHY SEIBEL,

District Judge

APPEARANCES

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CONFERENCE

THE COURTROOM DEPUTY: Mirena products liability litigation.

THE COURT: Good morning, everyone. Let me put on the record who I understand is here. Mr. Thompson, good morning, Mr. McCauley, good morning, Mr. Kekatos, Mr. Ronca, and somebody new.

MS SCOTT: Carmen Scott, your Honor.

THE COURT: Good morning to you. And I'm told on the phone we have Ms Abrams, Mr. Arsenault, Mr. Chmielewski, Ms Flaherty, Mr. Johnson, Mr. Grossman standing in for Ms Kassan, Ms Kaufman, Mr. Fox for Mr. Longer, Mr. Gallucci for Ms Nast and Mr. Smith. And in the back I gather we have Ms Glandian, Ms Vertullo. And is that everyone on plaintiff's side? And Mr. Faries is here too, and Ms Heacox. And Ms Cook, Mr. Shephard and Mr. Harrington. Good morning to you all.

Judge Smith could not be here, she has criminal duty and a meeting in the city. If you are still around this afternoon and want a few minutes of her time, you can call her chambers. She actually may be able to set some time aside. I don't know if you are all running to the airport right after this or not.

Okay. I've gotten in the last few days Ms Cook's August 7th letter, the pilot project Exhibit B statement, and two more letters from Ms Cook dated the 9th and the 12th. And each letter seems to show you inching either a little closer to

resolution of certain issues or the need for me to help you along. But let me, since it's now the 14th and you've been making progress every day, let me turn to you Ms Cook and ask you what you think it would be profitable for us to address this morning.

MS COOK: We have been working very hard, spent a lot of time talking to each other over the past weeks. And we still have the two areas that we're still not in agreement on on the schedule and then there are three issues on the defendant's fact sheet that still remain.

THE COURT: Okay. Why don't we talk about those. Let me find my notes on your schedule. It looks like, well, there was one date you were in agreement on. Everybody agrees the initial disposition pool should be April 4th. Everything else you were somewhere between three and six months apart with plaintiffs on some things, well, it looks like actually on just about everything, thinking things are going to take a little longer than defendants. Why don't you start with what you think makes sense, Ms Cook, and then I'll hear from plaintiffs on why they disagree.

MS COOK: Thank you, your Honor. Well, the parties are actually not that far apart in terms of the generic discovery deadline. We propose March 3rd which would give us seven months of discovery. We are ready to produce millions of pages as soon as we get an ESI protocol in place which we're

still discussing and negotiating and meeting and conferring on. And I would ask, or I believe that we have agreed that we'll be ready to submit that by next Friday. And if there are any issues, we can flag those for the Court.

Once we get that protocol in place, we're ready to start producing documents. We've already produced 1.7 million pages in the Baugh and Osborne cases as we discussed, and under an agreement that we have with plaintiffs' counsel, they have had access to those documents by signing the protective order that was in place in that case. So at this point, having as much knowledge as the plaintiffs have about which witnesses are important and the documents, we believe that they can be really targeted on what they think they're still missing. And they'll get millions more pages from us as soon as we have a protocol in place and can start producing the additional custodians that we've agreed to produce.

So based on what we're ready to do in terms of document production, we can start depositions in a couple of months. That would give us several months for depositions. And just given the number of witnesses involved and the size of the litigation, the value of the cases, we believe that seven months is sufficient time for generic discovery.

THE COURT: You think the millions of documents can be reviewed in time for depositions to start in a couple of months?

MS COOK: Yes, I do, just based on what we understand the plaintiffs' document review team, from what they've told us about the team that they have in place.

THE COURT: Who wants to tell me from plaintiffs' side why you think it should be six months after that?

MR. RONCA: Good morning, your Honor. The reason that we worked out the schedule and proposed it in that way is because what the defendants are requesting we do is just simply impossible. Yesterday or the day before we had to have a special review of documents in Washington in another case, so I was there personally reviewing documents with seven other people. So I had a personal indication confirming my other calculation of how long it takes to review documents. So seven people over two days were able to review 22,000 pages. These were higher level reviewers than you normally have. Partners and very experienced associates reviewing documents in a litigation that they knew about.

The basic average for those people was 250 pages an hour. If you calculate that out, it is impossible to even review the documents that they're promising us in that seven month time period let alone review them sufficiently to take depositions.

THE COURT: Was the review you were doing the first cut, or has somebody junior --

MR. RONCA: No, this was the first cut. We need to do

a first cut on all these documents coming from the other side. The one problem is that defendants propose that we review all these documents in two months and then start taking depositions and a number of documents we don't even have yet.

In addition, we don't want to start depositions until at least we have some broad-base review of the documents because there may be some documents that interface between witnesses, and then we'll be coming back to the Court and saying, we want to retake this witness because we got documents later that have to do with this witness, or have to do with a meeting this witness attended, or meeting minutes or handwritten notes that relate to this witness. We want to take depositions only one time after a fair review of the documents.

In addition, we were not able to come to agreement on what was to be produced. So we had to revert towards filing request for production of documents and interrogatories. Those were served on August 8th. The reason we had to do that is because we couldn't get actual confirmation of what documents we were getting in a written form that we thought was sufficiently reliable that we could represent to the steering committee and to our clients that we had enough coverage, that we were getting a complete set of documents.

So those were just served. We need the answers to those and we will need 30(b)(6) depositions to assure ourselves that we have the right types of documents. The defendants in

good faith have offered certain types of documents and they've offered us the custodial files of 14 people who they say are the key witnesses. And I'm sure that they believe that they're the key witnesses but we may disagree on who the key witnesses are. We asked for eight additional people. We haven't come to an agreement on that. So there's an additional time frame the defendants haven't built in for answering the interrogatories and requests for production and having 30(b)(6) depositions after that so that we can assure ourselves of the nature of the documents we are receiving, we can assure that we have received them in the manner that they were used in the business of Bayer as opposed to in some way -- I'll give you an example to make it easier.

The adverse event database is proposed to be given to us in limited form on an Excel spreadsheet. We don't know if that's the way it was used in the company or if all the information on the Excel spreadsheet displays the same way that it displayed to the company in whatever database software they use for that particular database. So without talking to an IT person and being able to ask questions and follow-up questions, we don't have an understanding of what we're getting.

And this is the typical process that's been done in any number of other MDLs in the past. Interrogatories, requests for production, 30(b)(6) depositions. So we need time in the schedule for that. We'll be reviewing documents the

whole time that's going on. But some time has to be build into the schedule for that.

The other thing is, and this was mentioned at the last conference, is that there are foreign witnesses that are very important to this litigation. The foreign entities have not been served yet. That's a process that takes three or four months and is extremely expensive, even to serve one defendant under the Hague Convention. And until -- we're told that until we have service, there aren't any lawyers here to speak for those companies, and we don't know if we can get the documents, we don't know what we could be getting, and we don't know when and under what circumstances we will be getting depositions of witnesses who probably live in Finland or Germany. So we need time in the schedule to do that.

In fact, in the last conference, the Court mentioned and all sides agreed that somewhere along the line the schedule is going to have to be adapted to take into account the foreign defendants as soon as we get lawyers here in the courtroom who represent those defendants.

THE COURT: Now you're making it seem like December 2014 is ambitious.

MR. RONCA: I thought it was ambitious to be honest. I don't think there's any fat in that schedule at all.

THE COURT: Any last words, Ms Cook?

MS COOK: Yes, your Honor. Some of the issues that

were raised go to the scope of production and the format of production, and those are issues that we are continuing to discuss and we will continue to discuss. And it's true that we offered several ways to come to an informal agreement on the scope of production and were unable to come to an agreement with the plaintiff because they did not want to be limited from requesting additional witnesses. But that doesn't impact the schedule. These preliminary steps, we're going to be producing documents at the same time that we're going to be responding to the requests that they've already served. As to the 30(b)(6) depositions, the plaintiffs proposed the deadline for those to be November 1st. And as they said, they will be reviewing documents that entire time, even up through the time that they finish taking any 30(b)(6) depositions that they want to take. So even after that process is over, the proposal that we put forth still gives them several more months to take additional company depositions.

THE COURT: I think that the problem is the 30(b)(6) depositions may result in a new round of document requests because that's when they're going to cement their understanding, if it can't be done informally sooner, of what else there is and where it was kept and all that. As I think I've now said at each of our conferences, nobody wants this over with expeditiously more than I do, but it's inconceivable to me that generic discovery will be done by March and I would

just have to end up having to extend.

I do expect plaintiffs' team to get through more than 250 pages an hour and I expect it to be a large team. But I just think defendants' proposal is too ambitious. And maybe some of the problems Mr. Ronca foresees will not come to pass. Maybe other ones we're not foreseeing will come to pass. But I think September 1 is reasonable. It's not impossible that we'll end up having to extend that, but I really think it could be done by September. I don't think it could be done by March.

So assuming that is the generic fact discovery cutoff, do the remaining dates fall into place or are there others -- in other words, are the differences in the other dates you proposed all keyed off of the differences in that particular cutoff, or are there other things where you're really miles apart on how long things are going to take.

MS COOK: There are other things. One deadline -- for example, given that the initial disposition pool will be selected in April, and there will then be several more months before the end of discovery, I see no reason why case-specific discovery should not end on September 1st as well.

Then there are the expert dates. There are two differences between the expert dates that the parties proposed. We proposed expert dates that put the generic expert reports due at the same time as case-specific expert reports. In our experience, there's a very large overlap between the two and we

want to avoid having to have separate depositions for generic and case-specific depositions, with the exception of, for example, damages experts, are only case-specific experts. But the vast majority if not all the other opt-ins have both case-specific and generic opinions.

The other difference is that the plaintiffs' expert discovery takes six months which seems much too long. They have two months just for the depositions of one side's generic experts, which seems very unnecessary, and I believe it could be done in a month, six weeks at the very most.

The other difference is in the way that the experts are disclosed. So they propose that the plaintiff give their generic expert reports and then Bayer gives their generic expert reports and then the plaintiffs' experts are deposed and then Bayer's experts are deposed. But what we always find that the plaintiffs' experts come up with additional opinions that they give in their depositions. So for us to be able to respond to them, what we proposed was for the plaintiffs' experts to be deposed, generic and case-specific, and then Bayer's generic and case-specific reports would be due.

THE COURT: You think it should go plaintiffs' experts reports, plaintiffs' expert depositions, and you're not distinguishing between generic and case-specific.

MS COOK: Correct.

THE COURT: And then your expert reports and your

expert depositions. And what's wrong with that, Mr. Ronca?

MR. RONCA: I'll start with that one instead of starting from where Shayna started. And I'll speak from experience. In every litigation that I have been in, mass tort litigation like this, in every MDL, and this is the third where I've been co-lead counsel, we've always agreed to do it disclosure plaintiff, disclosure defendant, deposition plaintiff, deposition defendant. The argument that they come up with different theories or opinions in their deposition is answered by the defendants getting to go second in every case. Their experts can come up with responses to that in their depositions. The only fair way to do it, to have our experts deposed, asked any question that the other side wants before we even know what their experts are going to say, is just unfair. Let us disclose first, they can respond to that, and then they can take our expert depositions when our experts have had a brief time to see what their defense experts are saying.

THE COURT: What about the issue of having the same cutoff for generic and case-specific?

MR. RONCA: We worked the case-specific not so much with respect to the general but with respect to the fact that we're picking them on April 4th and we allowed about six months to complete all the case-specific discovery. That sounds easy, your Honor. But let's say twelve cases are picked like there is in Nexgen and there is an inserting doctor, there's a

removing doctor, there might have been a doctor who checked at the four to six-week for the location of the Mirena, you might need three doctor depositions, plaintiff, maybe a spouse, that's two, sales reps, maybe one or two, you need seven depositions in twelve cases. You need 84 depositions in six months while we're doing general discovery, while we're doing other motions and things that occur in this case, while some of us at that point in time while probably be in Europe taking depositions of some of these foreign defendants. I assure you it is a pile of work to do in six months. You're talking about something on the order of, my math is not working for me, 12 or 15 depositions a month just for the case-specific, if we go with the plaintiffs' plan, which I think is, six months, very ambitious.

THE COURT: Aren't most cases -- well, I guess it's possible that there will be some cases where you do have several different doctors. But in most cases, isn't the doctor who prescribed it and inserted it and did the follow-up and removed it the same person?

MR. RONCA: A lot of these are done in clinics, in practices where there are multiple doctors. You see who you see that time when you go. This is not considered the kind of thing where -- I mean even for, I just had another grandchild. Even for delivering a baby it's whoever is on call that day ends up delivering the baby.

THE COURT: Except that the delivery of a baby can't be planned.

MR. RONCA: This is a C-section, your Honor. It's whoever was on call that week. I'm telling you, we'll be back here, we're talking about 30 days difference, we'll be back here asking for additional time because we will not be able to get these depositions done in that time frame.

MS COOK: Your Honor, the April 4th deadline is for the selection of the initial disposition pool cases. We don't anticipate that we will have done no discovery in those cases before then. In fact, in order for each side to fairly select the cases they want in the initial disposition pool, we will have had to have some discovery beforehand so we're in the same position that the plaintiffs are in knowing their cases and having spoken to their clients and everything else. So what we will plan to do before the April 4th deadline is take the depositions that are necessary to know whether we think that it's a fair case to select for the initial disposition pool. So we're not trying to cram, even assuming that that number of depositions is appropriate for each case, which I think is a different question and not one that I necessarily agree with, we won't be cramming that in between April 4th and September 1st. We will have done a lot of that work beforehand.

THE COURT: I take it you don't have to wait until April 4th to identify your generic experts. The selection of

the initial disposition pool cases isn't something that has to occur before generic experts discovery can begin, right?

MR. RONCA: Generic expert discovery at least on our schedule, your Honor, doesn't occur until after the documents and the generic discovery ends.

THE COURT: You can be working on that. In other words, the initial disposition pool selection is April of 2014. And the schedule that you're proposing has six months before you even make your disclosures of your generic experts and then two to three months after that for the depositions. And I guess I'm, my question is, I get that if we're going to have case-specific and generic experts in tandem, because you probably aren't going to commit -- if you're not going to commit on which cases until April, then you need time for the case-specific experts. But the generic experts it seems to me could be accelerated.

MR. RONCA: But the generic experts in the orderly processing of your case need to know what the documents say and the deposition results are before they can give their opinions. In the orderly processing of the case, we can look at documents, take depositions, turn those things over over time to the experts who then need to review all those things and then disclose the experts and then, and have the expert reports.

THE COURT: All right, I hear what you're saying.

They might not have everything they need until September 1.

MR. RONCA: We won't have everything we need until September.

THE COURT: What do you think about the defendant's proposal that case-specific and generic expert disclosure be made at the same time?

MR. RONCA: One is often dependent on the other. Step into our chair for a second. What we would have to do then is have the generic expert reports prepared and given in time to the case-specific experts so they can look at those things and -- they're interdependent. The generic expert reports on the science say yes, this can happen scientifically, physiological. There is a mechanism in action for the Mirena for perforate and migrate. We see this over this many examples. We know this from the anatomy and physiology of the body and from experience and case reports, for example. That is all gathered together by the generic experts report. The case-specific expert says: This individual plaintiff has this individual migration and perforation which falls into the same pattern that the generic experts are talking about when they're talking about a defect in the product or a failure to warn about the product.

THE COURT: Ms Cook seems to think, and correct me if I'm wrong, that a lot of times these experts are going to be the same person.

MS COOK: Right, your Honor, that's what we saw in, for example, most recently in the YAZ cases.

MR. RONCA: That was not true in Trasylol which is the same company. There there were case-specific experts who were distinct and different from the generic experts.

So again, you can talk about experiences, but what will end up happening, your Honor, because this is not a loose schedule where there is a lot of extra time. We'll come back and say you, see, the experts are different. Even though we can show you the transcript from when we talked about this in August of 2013 that they might be the same, the fact is that they are different and they're not the same person.

THE COURT: What can we do to accommodate your concern, which is legitimate, that the case-specific experts are going to want to see the reports of the generic experts while at the same time avoiding what Ms Cook is concerned about, which is having to do two depositions of the same person because there may be some cases where it is the same person. Could we at least, if I adopt something like your schedule, build in an exception for a situation where a generic expert is also going to be a case-specific expert so that that person only has to be deposed once? You should be able to tell by the time they do an expert report whether or not you're going to use the same guy or gal for a case-specific report.

MR. RONCA: I think we could set a point in time that

if it is going to be the same expert, we'll have status conferences on a regular basis, we'll report that to the Court, and they can schedule them at the same time. They're probably going to depose on the general things and then on the specific things separately, but you can certainly do it at one time if that turns out to happen.

THE COURT: Why don't I build in -- let's assume I'm going with something like your schedule but I'm going to require that the plaintiffs state by the time the expert report is disclosed whether that expert is going to be providing any case-specific reports, and if so, the defendants don't have to depose that person until after the second report is disclosed.

MR. RONCA: I think that's fine. I didn't get to discuss it with anyone, but I'm the one standing here.

THE COURT: And I'm the one sitting here.

MR. RONCA: You're the one making the rules. So I'm pretty much boxed in here, your Honor.

THE COURT: If there's a reason why that's a bad idea, I want to hear about it. But it sounds like a good idea to me.

MR. RONCA: Yes, one deposition. What you're talking about, Judge, is not having two depositions of that person but having one deposition of that person.

THE COURT: All I'm putting on you guys is --

MR. RONCA: Tell us, disclosure.

THE COURT: You make your generic expert disclosure on

October 30th and at the time you do that you tell them, this guy, this is the only report we're getting from him, or we're going to use this guy for case-specific discovery too. And if it's the latter, then the defendants will take one deposition of him after they get the second report.

MR. RONCA: Yes. My understanding is on the day of the generic expert disclosure we have to also say whether that expert is also going to be a case-specific expert and then the defendants will get one deposition after the second report and they can use it to cover both things.

THE COURT: Does that make sense?

MS COOK: The problem I see with that, your Honor, is under the plaintiffs' schedule, the case-specific disclosure is not until December 1st and then the case-specific depositions don't even happen until February. And in the meantime, Bayer has to disclose its expert reports without knowing the full extent of the opinions based on the deposition examination of the plaintiff's generic experts. So if we were going to have two separate sets of disclosures, we would want to have two separate depositions so we can fairly disclose our expert's opinion.

Another problem, even assuming that the generic expert disclosure, the generic experts for the plaintiff actually are interested in seeing e-mails from Bayer sales reps or whatever it is that's being produced a year from now in the September

1st deadline, they don't need two months until October 30th to complete those reports. They should be basically finished. If there's some late discovery that's relevant of some sort of study, which I cannot even envision, then they could finish their reports by September 15th.

MR. RONCA: Your Honor, all of the foreign discovery, this drug was developed in foreign countries, all the development information we're not going to have until we get the foreign defendants in here and we get that. And Shayna wants to say that oh, they'll have all this information and it will be just some sales rep depositions by September 1st. And that's just not so based on my experience in other cases. A lot of times the key witnesses come down at the end. A lot of times you find out about the key witnesses at the end.

Again, just to go back to another Bayer case in Trasylol, the very key witness was three months after the discovery deadline and the judge realized that it was a key witness and allowed us to take that deposition after the discovery deadline. And I know because I took it and argued the motion. So to try to say now anticipatorily, well, it's only going to be small potatoes in August of 2014, that's just not the way it happens. And to try to have experts cram out a report in 15 days after the generic discovery experts, it only predicts that we will come in here and say you know, your Honor, we got 50,000 pages of documents on August 1st and

they're all key stuff.

So I think the schedule that we put out was aggressive. For example, 60 days to depose the experts. The lawyers have other calls to other courts and have other things to do, and so do the experts. And what we'll find is that it's going to be difficult to schedule these experts and the lawyers all in the same place at the same time. And 60 days is aggressive for doing that scheduling. It's the same thing for the case-specific. When you talk about scheduling these doctors, in the Nexgen, we're scheduling doctors now for January for bellwether cases. And Judge Pallmeyer wants an aggressive schedule there. But these doctors aren't available. You can't make them come.

THE COURT: Yes, doctors are a big pain. I say that as the wife and daughter of a doctor, so I'm allowed to.

MR. RONCA: They're not a big pain when it's taking care of patients. But when you try to get them to a deposition, it's a big pain.

MS COOK: It's less of a big pain when you're paying them for their time as experts. And they have agreed to take their time to be experts in the case.

THE COURT: I'm sure you'll make it worth their while.

MS COOK: May I address the foreign witness issue for one moment. We have seen only three cases in this MDL that even name a foreign entity. An entire other case was heading

to trial without ever even naming a foreign entity. To say that all of a sudden things should be held up because of an afterthought of naming foreign companies, and the complaints that I'm hearing that there is a treaty, an international treaty that the United States entered into with Germany and Finland -- you know, we discussed this last time at the hearing. The plaintiffs will serve them if they want to as expeditiously as they can. If it ends up that they're not able to serve them in this time, we can deal with the schedule then. As it currently stands, I don't believe that it's appropriate or fair to Bayer to have that hold-up of the schedule.

THE COURT: I'm not going to worry my head about that yet. If they get served and if they're in the case, it seems to me they will share the defendants' desire to get this moving quickly. And it may be that they can jump right up to speed. Even if they have other lawyers, somehow I doubt they're going to want to reinvent the wheel when the American entity (a) is itching to go, and (b) will have done such fine work.

MR. McCAULEY: Your Honor, if I may just address one issue that Ms Cook brought up about the number of cases that have been filed with respect to the foreign defendants. The foreign defendants have become an integral part of this litigation because of foreign regulatory rules when it comes to producing custodial files. In the Baugh case, there were five specific custodians that were identified by the Bayer U.S.

witness as being key people who have a knowledge of the product. Therefore, they're people we need their documents for.

Defense counsel and myself undertook a discussion about how to try to get that without service. The problem is that neither one of us want to violate international rules in this so-called Hague petition or Hague treaty that's out there, something that's been applicable for quite sometime when it comes to foreign defendants and specifically this defendant. Bayer and Bayer AG are very familiar with what is necessary to bring in their employees from foreign companies. The past practice of Bayer has always been that the defendant must be served once in each jurisdiction with respect to here and with respect to New Jersey. As far as naming and trying to send out complaints for, between the two litigations, almost 400 cases, I can tell you from my office having done that that would be a multiplier of about 15,000 dollars per case to have them served.

So while we have been doing everything we can to expedite the process in which these witnesses are brought in, and there was an offer from defense counsel of producing the witnesses, somehow they don't represent them, but they were going to produce witnesses without a custodial file. They were going to go to their client, I shouldn't say that, they did not commit to it. We were discussing about whether or not they

could produce the witness without a custodial file. That just creates duplicative work because once we do the deposition over in Amsterdam, because we can't do it in Germany, we're probably going to find a document that's in a custodial file that we don't have and go back all over again.

The reason why there haven't been service attempts of 400 people, relying back on the very first conference in which your Honor brought about trying to coordinate and decrease the potential expenses associated with this, are just that. We are trying to move it along. The estimates are from our service, which as a main service it does this type of work for many litigations, is it's going to take it until at least October, which will bring us up to actually have to ask your Honor for an extension of the 120 day time to serve because we're going to be outside that.

We you are moving as fast as we can. These are people specifically identified. We actually have the hindsight of U.S. witnesses that have identified them. This is not a shot in the dark or throwing darts at the wall. These are witnesses that their own people have identified. So we're trying to move this along as fast as we can.

THE COURT: I'm going to wait and see. I don't doubt what either side is saying. I'm going to set a schedule that I think works. If the foreign entities come into the case, it is my hope that they will share the current defendants' desire to

move things along and they'll share their work, etc. If they don't, we'll have to revisit. But I want to put in a schedule that I think is realistic for what's in front of me now. And I'm sure Ms Cook, consistent with her consistently expressed view that they want to move quickly, will do whatever she can to speed things along. But I gather you don't represent them and all you can do is speak on behalf of your client.

MS COOK: Your Honor, if the entities are actually served and brought into the lawsuit, I will represent them. I do not have authority to waive the service under the treaties and I also don't have any authority to violate the EU's privacy laws and produce documents from there.

THE COURT: I always like to avoid an international incident if possible. Once they're served, maybe you'll -- look, I don't second guess this. As a matter of principle, if they want to wait to be served, that's what the law entitles them to do. But they're going to be represented by very reasonable counsel once they're served and they probably won't insist on doing everything formally once they're in the case.

So I think I understand why defendants would like the generic and case-specific disclosure at the same time so they only have to take one deposition. I understand why the plaintiffs don't want to do it that way because the case-specific experts will build on what the generic experts say. I thought I had a great idea to solve the problem, but it

doesn't solve the problem from the defendants' perspective, so I think I'm just going to fall back to the traditional way of doing it, which is plaintiffs' generic expert reports, then defendants' generic expert reports, and then depositions of the generic experts, and then the same with case-specific. Let me just look at the dates that plaintiffs have proposed, which is essentially --

MR. RONCA: There's an overlap. Like while the plaintiffs' generic experts are being deposed, our case-specific disclosures occur. It's not like we're doing all the case-specific after the fact.

THE COURT: Right. But you wouldn't be making your case-specific reports available until after both sides have done their generic reports, which makes sense. I'm just trying to figure out if there's a little room for me to tighten up. Because what you've proposed is the expert depositions wouldn't be completed until May 1.

MR. RONCA: Right. But I have the plaintiff case-specific experts just two weeks after the defendants' generic disclosures. It's very tight.

MS COOK: I believe they have a two-month time frame between the end of generic discovery and their generic expert disclosures, but then they give us two weeks for our generic expert disclosures after theirs. I think the October 30th date should be moved up to September 30th and then we should get a

month after they give us their reports.

THE COURT: I guess the reason for that would be if you take a deposition on August 31st, the experts are going to need that. But we can tweak this a little. I can shave a couple of weeks here or there; before you know it, I've shaved a month or two. Why don't we make that October 30th date October 15th. And then leave defendant's generic -- that doesn't buy me any time, then defendants will be a month later. Right now there are six weeks between the disclosure of the defendant's generic experts and the beginning of the depositions of the plaintiffs' experts which is longer than I would do except it's right after Christmas.

MR. RONCA: No. It's two weeks.

THE COURT: If the defendants make their reports available November 14th, ordinarily I would say okay, start your depositions four weeks later, but the last two weeks of December are sort of a waste.

MS COOK: As far as I'm concerned, we can start our depositions of the plaintiffs' experts right after we serve our expert reports.

MR. RONCA: They have to read them.

THE COURT: They'll read them quickly. Why don't we say --

MR. RONCA: We already have it set at two weeks.

THE COURT: Right now their expert reports are coming

on November 14th. They are willing to start deposing your experts on December 1 instead of January 1.

MR. RONCA: That's what we proposed. That's what we already proposed.

THE COURT: Maybe there's a typo on the sheet I'm looking at. Oh, yes, it's a typo on the sheet I'm looking at. And do you really think you're going to need -- probably you will need eight weeks.

MR. RONCA: Because of the two dead weeks at the end of December.

THE COURT: All right. I'm with you. And do you think you can depose, you're going to need eight weeks to depose Bayer theirs. Can I tighten the schedule for depositions of defendant's generic experts to end March 15th instead of April 1.

MS COOK: I don't think it should take two months but I've already made that clear.

THE COURT: I'm going to make that March 15th.

MS COOK: Your Honor, I also think since we're staggering the generic and case-specific expert disclosures, I don't see why they need to be staggered by a month and a half. I don't see why the plaintiffs' case-specific disclosures couldn't come on November 1 or November 14.

MR. RONCA: Because we don't have your generic expert reports is the main reason.

MS COOK: I don't see that the plaintiffs' case-specific experts would be responding to or relying on defendant's generic experts.

MR. RONCA: I think we're entitled to know your theory before we go case-specific.

THE COURT: Why don't we move up the depositions of defendants case-specific experts and make it March 1 to April 15. And if any of these dates turn out to be Sundays, we'll tweak them, Saturdays or Sundays. And then the motion deadline, you can make that May 15th for dispositive motions. Essentially, the schedule I'm going to adopt is that proposed by plaintiffs with the following exceptions.

The deadline for plaintiffs' generic expert disclosure is going to be October 15th. The depositions of the plaintiffs' generic experts -- no, withdrawn. That's going to stay the same. The deposition of defendant's generic experts is going to be February 2 to March 15. And the deposition of defendant's case-specific experts is going to be March 1 to April 15. And the initial pool, *Daubert*, and summary judgment motions deadline will be May 15. This seems like a reasonable middle ground but it's something that's achievable. I think I'll consider myself very fortunate if we stick to that.

MS COOK: Your Honor, may I just raise one point. You changed the defendants' case-specific experts depositions to be from March 1 to April 15 but the plaintiffs' case-specific

experts are February 2 to March 15th so there's an overlap where potentially our experts could be deposed before theirs so I would suggest moving the plaintiff case-specific depositions to start something like January 20 through the end of February.

THE COURT: They won't get your reports until the 15th. I mean yes, there will be an overlap. But obviously, if you haven't deposed plaintiffs' expert on case A, you're not going, they're not going to depose defendant's expert on case A. You'll just have to work that out. But if you've done plaintiffs' expert on case B on February 2nd, there's no reason why you can't do the defendant's expert on case B. Unless you think it's going to be all the same person.

MR. RONCA: Which we've agreed that we would disclose. And your Honor, I don't think we're going to come in here with a situation where we try to snooker them and take their expert before they take our expert. That's just not going to happen. You're not going to allow that to happen. They'll complain to the Court either at a status conference or via letter.

THE COURT: I can put a footnote in the order saying plaintiffs will not depose any defense expert on a case as to which defendants have not yet deposed plaintiffs' expert. I don't expect any double-crossing.

Now, you have some issues and the fact sheets. The first is plaintiffs want to know about the defendants' sale contacts, etc., with the prescribing doctor, the inserting

doctor, the follow-up doctor. And the defendants' argument is with respect to, and correct me if I'm wrong, that prescribing doctor and inserting doctor, okay, but the follow-up doctor or the removing doctor, what he or she knew or believed or was told isn't relevant because the issue is what warning was given before the thing went in. Why do you need the sales calls of the doctor who solved the problem at the end?

MR. McCAULEY: Your Honor, in this particular case there will be certain issues where it is a moot point. So where a gynecologist saw the patient and prescribed the Mirena to be inserted, and that gynecologist continued through with treatment after the insertion for a six-week follow-up, a year later for the annual visit, and if that physician is the diagnosing physician and then -- it's questionable, based on surgical capabilities, whether it will be the removing physician, that will be the same person.

THE COURT: Mr. Ronca told me why it probably won't be in more cases than I thought.

MR. McCAULEY: In some cases. In other cases where somebody went to say Planned Parenthood and had an insertion done and then followed up with their own OBGYN or went to a different OBGYN clinic, right there we have two different people. We have the person they saw at Planned Parenthood followed up by a second person that actually did an IUV check. In every one of these cases, your Honor, the annual notes and

the follow-up notes all say IUD check confirmed, Mirena in place. Whether they do it on a sterile speculum examination, whether they do it on a radiological examination, or how they palpate the fact that the strings are there, there's an examination done. And it's done in different avenues, whether it be in the timing of the first follow-up or the in the annual visits. In the label and in the discussion between the doctors and Bayer there's directions to them as far as how long the string should be, what to look for, and the information that they need as to whether or not to make a determination that this device is actually still in place one year, two-year, three year, four years, five years. That's important, your Honor, because in a typical prescription drug, medication case, you could be dealing with eight, nine, ten years of medication. We have a five-year window of efficacy that's claimed by the defendants. So what we're looking for is the line, we've sort of developed the term ourself, the vertical line, in that five-year period maximum five-year period. So a woman goes and she has the device implanted, she goes back for a follow-up, she goes for her annual visit, another annual visit, two or three years in. You're talking about two or three, possibly, different doctors.

THE COURT: I understand why the doctors are important. I am trying to find out why if you're not the inserting or prescribing doctor your sales contacts with Bayer

are important.

MR. McCAULEY: Because that is there, as the testimony always comes in from the sales reps, they give the information to the physician. They come in with the samples, they come in with the package inserts, labels, and they impart that information to the doctors. And that's different for Bayer's product and from other products.

THE COURT: What elements of the claim will it relate to? It can't be the failure to warn because the decision to put the thing in was made by somebody else. Let's assume Dr. A prescribes the device, puts it in, and does the four to six-week check-up and Dr. B does the annual after that. What elements of the claims would Bayer's contact with Dr. B relate to?

MR. McCAULEY: The information that it would apply to is the continued conversations between the plaintiff/client/patient of the doctor and the physician. In the plaintiffs' fact sheet, the defendants demanded all discussions between the plaintiffs and their physicians with respect to the product, the life of the product as inserted.

THE COURT: I get that part. What about Dr. B's sales calls to Bayer.

MR. McCAULEY: That information and whether or not Dr. B has had discussions about the possibility of perforation being a risk are completely within the relevance of the

litigation.

THE COURT: Talk to me about what element of what claim. Let's say Dr. B had a sales call from somebody at Bayer and they told him something that he then told his patient. What element of what claim does that help you with?

MR. McCAULEY: The discovery of the problem itself. It also comes into what's --

THE COURT: The discovery of the problem, the doctor discovers it. But what's the relevance of what the sales rep says to the doctor that is going to make a difference to one of the elements of your claim? You're going to need the doctor to say as a matter of fact I discovered the problem, but what difference does it make whether he met with Bayer one time or a hundred times?

MR. McCAULEY: Whether he's had communications with Bayer about what could be a cause of the perforation and the information that he may have imparted on that sales representative, and that physician's information report or PIR that's generated by that visit with the doctor. When the sales recommend comes in they ask him about the experience with the product, and if he has any questions of that particular sales rep, and it's a different physician, and that goes back to the company, which is where we ask for and get the physician information reports about the treating physicians. Because it doesn't have to be with this particular patient. It could be

their knowledge and experience of the product. And as the knowledge and experience of the product develops across the different physicians, that is something that's relevant.

And I would suspect that when that treating physician is deposed, and they will depose that treating physician as part of the bellwether process, they will ask that physician whether or not they had a sales call from a sales rep, a different doctor, and they will go directly into the information about how many sales calls they had, the information they were given about warnings, all information we'll be in the dark about as well, your Honor.

THE COURT: I'll give you one more chance to tell me what elements of what claims. When you're standing before the jury, you're going to say: The doctor who removed this device had been contacted by Bayer sales reps six times and therefore ladies and gentlemen ...

MR. McCAULEY: There's a continuation of failure to warn here as well, your Honor. The product can be removed at any particular time. Just as when somebody goes on a medication, if they are put on an medication by a specific OBGYN and he retires and they go back a year later and that prescription is filled by the new OBGYN, it's a continued discussion, it's a continued failure to warn issue there. If they're having some sort of complaint and they go back to the doctor, that second doctor is actually going to talk to them

about the risks and benefits of the product they have inside of them at that particular time and an informed decision by the plaintiff is going to be made as to whether or not the device should remain inside and whether or not they should maybe seek a different one.

There are plenty of cases where the Mirenas are removed before the five-year efficacy, the voluntary removal. The discussions and the reasons why it was removed, and the information that the physician has in their armamentarium with the discussions is very relevant. And that's where the continuation -- this is not --

THE COURT: You think it will help you prove that Bayer failed to warn by proving that after a discussion with the sales rep the doctor didn't warn the patient to take it out?

MR. McCAULEY: It goes to the knowledge of the physician that's following up with the patient. The knowledge of how long the string should be. One of the issues in this case will absolutely be whether or not there's an alternative causation raised of medical malpractice. Whether or not the physician knew how long the strings were when they went for a follow-up visit, if that changed, how does that physician know and the information that they get amongst themselves.

We had offered, your Honor, on the specific, on the defense fact sheets, the initial negotiations, the defendants

have always said we will only give you just the prescriber inserter. We say okay, we'll come off of this whole line of doctors that we want and say can we have the prescriber inserter plus one. We'll be able to look at the records we have and we'll see who that person is and we'll see if we can identify that particular person as being a key witness. That will be the plus one. We're not looking for general practitioners or people who are not related to the care. We're looking for physicians, very small finite group of physicians who actually treated the patient after it was inserted.

There's also a continuing course of marketing efforts as to safety and the possibility of spontaneous perforation. There are discussions that go on and it's information, that we see every time in every single sales rep deposition, that is imparted upon the doctors when they go in for these visits.

THE COURT: Ms Cook, why isn't it relevant that your reps may have lulled follow-up doctors into thinking everything was copasetic when it wasn't?

MS COOK: Your Honor, the purpose of the defendant's fact sheet in any MDL is to provide information about Bayer's communications with the prescribing physician which is the only physician that the duty to warn runs to.

THE COURT: Isn't there, because the product requires annual, I'll call them check-ups, isn't there a duty to warn that doctor too?

MS COOK: I'm not aware of any law that has a duty to warn doctors who do not prescribe the medication. And the example that Mr. McCauley gave about other cases where you have doctors who are refilling medications is a totally different situation because those doctors are actually making a risk benefit analysis about whether the drug is appropriate for the patient. That is a prescribing decision and that is the situation where the company would have a duty to warn. Bayer's contact with the doctors or sometimes nurses who are doing these threads checks who are not making a prescribing decision -- they're not performing an independent risk benefit analysis every time they check to see if the threads are in place -- are not relevant to a duty to warn.

THE COURT: You're probably right as a practical matter in most cases. But aren't there some cases where somebody goes in for a thread check and the doctor would say, you know what, I don't like this device, I think it's dangerous, I think you should take it out.

MS COOK: That might be a situation that may happen. If there gets to be some crazy hypothetical situation like that in an individual case then the plaintiffs can ask for the records pertaining to that individual doctor. But the defendants fact sheet puts the burden on Bayer to give a whole range of information about every single case. And this burden is very high. Bayer has to go to nine, at least nine different

sources of data, databases, multiple departments within Bayer to get information about sales calls, the samples left, any adverse events that are reported, the person was ever paid for any consulting agreement, whether the person ever attended any conferences, try to get their prescribing data. All of this information is a huge burden to get and as a compromise in this case, because in every MDL there is a defendants fact sheet for one person, that's the doctor who prescribed the medication, and that's it. And in this case, because it's possible that a nurse midwife or something may have recommended the Mirena to a patient and said that it was the appropriate birth control for that patient, and then there may have been another doctor who actually did the insertion because the nurse midwife was not permitted to do so under law, we have offered that we would give all of this information about both of those people. Because technically speaking, both of them may have done a risk benefit analysis about the Mirena.

But the person who is physically doing a check, a check that, as Mr. McCauley said, is clearly laid out in the label four weeks later or a year later or years later is not relevant to the duty to warn or any other claim in each of these hundreds of cases.

MR. McCAULEY: Your Honor, if I may. With respect to Ms Cook's claim that it's different between a PO or pill-based product and this particular product and the risk benefit

analysis, I submit to the Court that it's not. Because when a patient comes back to the doctor for their annual visit after taking Bayer's product, a determination is made at that particular time whether or not this particular product is delivering a particular hormone the patient is appropriate to continue on, whether or not there are any untoward effects or anything that may want the patient to discontinue the product. If the patient continues on, and if it's a different physician that had that, that information was turned over, that information was provided.

With respect to Mirena, Mirena is levonorgestrel, a different type of hormone. When the patient goes back to their doctor and they have the same type of a discussion about whether this particular birth control method is appropriate for them and whether or not they should continue on, and it may be something as simple as how is it going, a discussion is had and if it's a different physician there's still the drug in the body, levonorgestrel is still in the body at that particular time. It's the same kind of medication as an oral contraceptive, it's doing the same thing. And a decision is made at that particular time whether to continue on the medication and whether that's appropriate.

That's where the issue comes in as far as the continued knowledge of it. As Ms Cook says, in those particular cases it was a continued prescription. Here we have

one prescription except that prescription renews itself every year for five years while it still remains in the person's body. So while there may have only been one medication prescription written at a particular time for this particular medication, the medication vessel or vehicle, it's continued, because it can be be voluntarily removed most times in the same office visits. It's the same continuum as staying on a PO medication, your Honor.

THE COURT: All right. I think it's important to remember that we're dealing with a fact sheet here. I'm not saying that this is not discoverable information, but I do not -- I agree with the defendants that it would be burdensome to require it in a fact sheet. However, if facts are developed along the lines of what plaintiff suggests, either through depositions or something the plaintiff says in the plaintiff's fact sheet, or if the issue of malpractice in failing to remove it rears its head in any fashion, then the plaintiffs can make a request in a specific case. But I think given the likelihood that in most cases there will have been no particular discussion at the follow-up visit, no particular decision-making by the provider at the follow-up visit, it would be burdensome to require it in the fact sheet. But if there is any hint that there were risk benefit discussions at any follow-up visits, then the plaintiffs can make requests specifically with respect to a given patient.

MR. McCAULEY: Stepping outside of the fact sheet for a moment, we'd like the opportunity to renew this issue when it comes to the trial court, because we'll be down to a much smaller group of cases, ten or fifteen cases, and we'll be dealing with cases specifically where the defendants will be going out and taking all of these doctors' depositions.

THE COURT: Well, that might be so.

Issue number two, the plaintiffs want to know the number of nonMirena sales calls made by women's health sales reps from the introduction of Mirena to now, I guess. And defendants think that's not relevant, and they will give annual sales calls on all products by every representative within the three years prior to insertion. Why, Mr. McCauley, do nonMirena sales calls from the beginning of time, or from the introduction of Mirena, which was when?

MR. McCAULEY: 2000.

THE COURT: From 2000 to 2013, why is that -- I understand you're getting a hundred percent of the Mirena information, but why is information about some other product relevant?

MR. McCAULEY: This was dovetailed into the discussion we just had. We're not specifically looking for the identification of the product or the sales information that goes along with that product. However, the information that we were looking for has to do with the number of times Bayer's

sales rep came into the new prescriber inserter's office and the dates which they came into the office. And that's important because many times the women's health care sales reps detail more than one product. In this case it could be Mirena, Beyaz, YAZ, Ocella, and they would have been in the office on Tuesday detailing one particular product and then back on Wednesday detailing two products.

It's not the product information, it's the number of times the people came into the office and the dates in which they came into the office that is relevant. It's an opportunity for the physician to be speaking to the same sales rep. Sometimes there are different sales reps, but at the same time they're Bayer witnesses and employees, that come into the office and typically say to the doctor, if it's a YAZ or another product discussion, and limited to that, okay, and at the end of the call it will be something like do you have any other questions about anything else. It's an opportunity for them to either give the information to them or ask a question about another Bayer product. This is limited to just the dates --

THE COURT: How does it really help you if it's just limited to the dates?

MR. McCAULEY: It tells us they were in the office five times that week rather than when the defendants turn over the sales notes and it shows just that they were there just one

time that week.

THE COURT: And from that you're going to argue: Ladies and gentlemen, this doctor was in the pocket of the Bayer company, who was getting pizzas from the guy every day. I mean, what argument are you going to make?

MR. McCAULEY: It plays into the exposure that the physician has to Bayer and the opportunities that are there for them to either discuss particular information with them or ask questions.

THE COURT: And Ms Cook, this sounds less burdensome. It looks like you would just have to go to your sales reps for their visit information.

MS COOK: Your Honor, so what we're talking about is not dates of calls at all but what -- let me just start by saying I actually don't think that Bayer's position is that this information about other sales calls on other drugs doesn't have any relevance to the lawsuit at all. As a compromise, we offered to provide the annual number of nonMirena sales calls on the prescribing or inserting physician. The only question is what time period. We offered the three years prior to the plaintiffs' insertion because while it's not as massive as a burden it's still a burden to count up all the calls for every year. The plaintiffs want the information from the beginning of Mirena, the first time there was a Mirena sales call on a physician, which as you know could be back in 2000 or 2001,

through the present.

THE COURT: They also want the specific dates, not the total number.

MS COOK: That's new this morning because our agreement is that we would have the annual number of sales calls and the only question is what time period. And the other reason this request for all calls through the first Mirena, all annual calls through the first call of Mirena to the present is an overreach is because the plaintiffs have agreed with all of the other information they're getting that they will only get them through the date of the removal of the Mirena. So our position is that it should be three years prior to the insertion, and it certainly shouldn't be up to the present.

THE COURT: What's the significance of calls that may have occurred -- if the thing was removed in '08, why do you need the calls from '08 to now?

MR. McCAULEY: Your Honor, that particular area and that language is definitely left over from prior iterations of the document which included asking for the dates. So in comporting with what has been agreed upon as far as up to the removal date, we would be looking at it for up to the removal date.

THE COURT: I think this is of some marginal relevance but it's some burden too. So I think the three years prior to insertion is a reasonable compromise. They'll be able to

argue, Bayer was in this doctor's office four times a week for the three years before she's prescribed this thing and how many times they were there, four or five or six years previously, just seems very remote in time. So I think the defendants' proposal is a fair compromise.

And the last dispute I guess is over the sort of catchall request which plaintiffs argue isn't burdensome because it's been in the fact sheets for YAZ and other products. And defendant's view is that the searches, the requests that have already been agreed to are going to turn up everything that there is to find and it's duplicative.

I guess my first question is does anybody know what the experience has been in the YAZ or in the other MDLs? Do you ever find anything that hadn't already come up?

MS COOK: Your Honor, it's true that this language, this sort of generic catchall language has been in other CMOs including in the YAZ case. But that does not mean that the companies actually ran searches for the plaintiffs' name throughout the entire company files. In the YAZ case, they looked in the places where, if the plaintiffs' name were going to be anywhere in the company it would be in these places, which is in the database that includes customer inquiries or complaints and in the adverse event report database which would include if there were any reports submitted in an adverse event that the plaintiff suffered while taking the medication.

And in the defendants fact sheet, sort of before the document request, Bayer has already agreed to produce these documents, communications with the plaintiff or her physicians, which are the customer complaints database, and then a copy of any adverse event reporting form that was produced concerning the plaintiff. And from our conversations with the plaintiff, they don't actually expect us to search everywhere in the company. But even though this language was written in other CMOs, I would like it to accurately reflect what we're actually planning to do just so it doesn't appear that there's some additional burden on us.

THE COURT: What is it, Mr. McCauley, that you're really looking for if you're not asking -- I'm glad to hear you're not asking them to search the whole company because that would not be reasonable.

MR. McCAULEY: My example to them was we were not asking them to go to the CMO's desk to look for an index with our client's name on it. And I can point directly to even in the declaration of this and other Bayer cases it talks about due diligence and reasonable inquiry. And the limitations of the language say any nonprivileged document which relates to or refers to the plaintiff other than documents received or produced in discovery in this matter and subject to the limitations and exceptions described in this DFS. We have reasonableness, we have due diligence, and we have a relation

back to the actual DFS.

One thing I pointed out in the discussions with Ms Cook was when they ran off the litany of places they would actually look for I said that's fine. They're not actually articulated by name in the fact sheet. The customer service database is not articulated by name in the fact sheet. Other information could come from the physicians. This is all a reasonable inquiry. And that's why in countless fact sheets, whether it's the two YAZ fact sheets for the same defendant, whether it's the Fasinex fact sheet, whether it's the Actos fact sheets, they all rely on due diligence and reasonableness. While it's a catchall, it has parameters behind it. And there's never been a position where we said you need to turn over every single paper, look at every single bulletin board in the lunch room see if the client's name is on it. It's the reasonableness and due diligence as the fact sheet points out.

THE COURT: If you're content with what Ms Cook says they're willing to do, why don't we put that in.

MR. McCAULEY: That puts us in a position where they now need to name the databases they were looking at. To be honest, we were mystified by the pure objection, because they coopted the entire document section from the YAZ fact sheet changed it to Mirena and then cut out number one. It's all about reasonableness, your Honor and it's a reasonable inquiry. What she's actually saying and suggesting they have to identify

where they're going to search. And that's not what the fact sheet says.

THE COURT: Do you want to keep secret where you're going to search?

MS COOK: No. Without naming the databases, I just said it in open court. I'd be happy to put in the names of the databases that we will search for.

THE COURT: So if you're okay with all those databases, then instead of saying any other document not named above, how about any other document relating to the plaintiff or the relevant doctors found in the following databases.

MR. McCAULEY: It brings back, your Honor, what is going to be a reasonable inquiry. With respect to the DFS that relates to individual plaintiffs, we'd be talking about identifying all sales reps' custodial files, all sales reps e-mails, regional managers' e-mails. The list of people is not just a short inquiry as far as a reasonability inquiry would go. It goes across an entire span of people that on its face seems like it's six or seven people but in reality it could reasonably be within the grasp of 60 or 70 people. And that's where the reasonable inquiry comes in. It's not a nefarious request and a search for every document and every page of Bayer. It just points them and keeps them responsible for looking for it reasonably.

MS COOK: I disagree that that would be a reasonable

inquiry. There is no reason to believe that the individual plaintiff's name would be in some Bayer custodian's file somewhere. And that's exactly why we have a problem with the broad request. The two places that we could think of that we could have a plaintiff's name are the ones that we agreed to search for, and it's just not reasonable to run these searches for every single plaintiff in a whole bunch of custodial files where they're not likely to be mentioned.

THE COURT: I think in light of the very specific things that precede this last catchall which is enough in itself, I think, to make it extremely unlikely that relevant stuff would be missed, some sort of -- I don't really see the point of having a requirement that says or anyplace else -- well, hold on. Let me look at the exact language. I don't want to summarize. Any document which represents or refers to plaintiff that hasn't already been produced and subject to the limitations and exceptions in the DFS. When what we're really talking about is any nonprivileged document relating to the plaintiff that's going to be in one of these two places. Let's just say what we're really talking about. And again, if it turns out that there's some reason to believe, if a plaintiff says I actually wrote a letter to the CEO, then you go back and look for it. Because you'll know where to look. Or a particular plaintiff says we have reason to believe it's going to be somewhere else, and if after you do your 30(b)(6)

depositions you conclude that the customer complaint and adverse incident report databases are not the only places where individual plaintiff's names might be named, come back and talk to me. I'll all ears.

MR. McCAULEY: If the treating physician advises the sales rep that they had a perforation and they provide the patient's name to the sales rep, that goes to the sales rep who has a duty to report it to Bayer. I can't tell if that name is going to continue on or not continue on to particular people either in sales and marketing or just straight through to when they do the adverse events and possibly PIR. And these are all documents that I would expect, quite frankly, would be turned over within the scope of the DFS anyway. The DFS doesn't say in it that they're going to look for the document in a reasonable area.

That particular area, when it comes to direct references to our clients and the physicians that are treating them, are within the relevant scope. Outside of that, that document will find its way through to the medwatch department or the adverse events department, and there may be a discussion internally about it in the sales department. I don't know.

But the reasonable inquiry that's there, we would expect to have the materials turned over to us. And this was more of if they start naming every single database or if they miss one or it was somewhere else, then the argument will be

that's not reasonable or that's not part of the database. But I understand your Honor's position.

MS COOK: If you have the fact sheet in front of you it actually covers what Mr. McCauley was just mentioning. We agreed to produce it. "Please produce a copy of any medwatch form and any other adverse event reporting document, form, line-item listing or other such information whether internal or not that refers or relates to plaintiff including back-up documentation concerning plaintiff and any evaluation or investigation you did concerning the plaintiff." And that's already, it's under the plaintiff's medical condition as well as please produce any nonprivileged documents that reflect any communication between plaintiff and physician or anyone on behalf of plaintiff other than counsel for plaintiff and you concerning plaintiff. So these situations that he just mentioned would already be covered and we've agreed to produce those.

THE COURT: I don't see the need for that catchall request. But again, we're just talking about the fact sheet, and in any individual case, if it turns out there's reason to believe that it's not covered, you'll go back to the defendants and to me if necessary, and also if after your 30(b)(6) depositions you realize that there are other places that reasonably should be looked at, we can always revisit.

Are there other things that you think are ripe either

for me or for Judge Smith at this point? I think she's the queen of electronic discovery and she understands predictive coding and things like that. But I don't know if you guys are ready to talk about those things yet.

MR. McCAULEY: Your Honor, if the opportunity is available, we would like the opportunity to speak to Magistrate Smith about specific issues on how the documents will be processed. We have been working to complete the production protocol which, as Ms Cook said before, the production protocol will cover how we receive the materials. It's the middle area about how they're processed, with straight keywords, or whether they're done with advanced analytics or predictive coding.

The defendants have taken the position that they're going to produce in a way that's acceptable for the Federal Rules. And we've had a position that we think that advanced analytics would be a better process. That discussion has continued on; the defendants have held their ground that they don't wish to work their way.

THE COURT: I'm definitely punting to Judge Smith on that and I'm going to punt you to her on the issue of costs and what's proportional depending on whether there's going to be 14 custodians or 22 or whether the remaining 8 you should split the cost of. And as I said, if anybody is going to be around, you can check with her chambers now, but she may have a few minutes later this afternoon. I don't think it has to be the

whole day but maybe if somebody from each side can pop in and talk to her about how she wants to tee it up, wants you to come back, letters. And if you think it's premature to talk to her, that's okay too.

MR. McCAULEY: I think we'd like to have an opportunity to speak with each other.

MS COOK: Right. The parties have more negotiating to do on the protocol. We're close, I believe, and we've agreed to submit it by next Friday. And if there are any remaining issues we'll submit that by next Friday. And if we have, we have also agreed that if we need to set up a hearing with Magistrate Judge Smith that we will jointly find a time that works for both of us and go to her to set that up.

With respect to the predictive coding issue, I don't believe that that will be an issue that either Judge Smith or yourself has to deal with because my understanding from plaintiffs' counsel is that given that they agree and do not contest that the method of keyword searching that Bayer is using complies with the rules, that they are not going to compel us to use another method over objection. So the issues we're really talking about are what kind of document extensions and what do you do with duplicates and things like that. They're not really heady issues at all and I believe we should be able to come to agreement on those.

THE COURT: Good.

MR. McCAULEY: We may have a disagreement on positions but I believe it's better for Judge Smith.

THE COURT: You can keep talking. Don't talk too long though because you want to get going.

MS COOK: I agree, your Honor, which is why I would request that if you could impose the deadline of next Friday on us in addition to our agreement to get finished with our negotiations by next Friday, then that would actually help a lot.

THE COURT: I impose that. I will tell you though that next Friday is the 23rd. I don't think you'll be able to reach me or Judge Smith the next week. That doesn't mean we won't be eagerly reading all our mail, but we're both not in the building that last week of August. But anything that you need to tee up for her, do it by the 23rd.

Anything else today?

MR. THOMPSON: Your Honor, I was taught at an early age that when you're sitting comfortably in court and nothing bad is happening, don't stand up. But I'm going to rise anyway in violation of everything that I've been taught.

There are three things that I'd just like to mention to you. Number one, it's clear from your honor's questions to Mr. McCauley with regard to duty and with regard to the process of device being inserted in women that you're a long way along your thinking in terms of obligations and duties.

THE COURT: Hardly. Hardly.

MR. THOMPSON: I want to make sure that the Court hears articulated from us that we disagree that the subsequent examining physicians, that there's no duty to impose upon those physicians with regard to a duty to warn. We disagree with that. We certainly are pleased with the defendants fact sheet, I don't mean to reopen that issue, we heard your ruling and abide by it. But we don't want to leave you with the impression that we don't believe that these subsequent examination physicians are people within the penumbra of an obligation to be informed and to inform their patients as well, particularly with regard to reasonable alternatives.

Secondly, there is a delicious aspect to this case, and that is that in fact Bayer has put on the market as of this past year a competing IUD device which is smaller, it's inserted for a shorter period of time, and has less hormone released in the body. So our obligation with regard to showing a reasonable alternative, we think that that's going to be a very fertile and very important area of inquiry.

THE COURT: No pun intended.

MR. THOMPSON: Your Honor, I just throw them out and sometimes they are embarrassing to everybody. So I just wanted to make that statement with regard to our view of duties and obligations of downstream physicians.

Secondly, your Honor, I do want to report back, I

think last status hearing I tried to report on the St. Louis forum, and I think I misspoke on every single major thing, the number of cases, the status of cases.

I can report that that *forum non conveniens* motion that was pending has been decided in favor of those cases, has been decided in favor of those cases proceeding in front of that forum in St. Louis. And that will be a continuing node of state court activity. I believe at a reasonable time, a liaison with that court and the New Jersey court will be advantageous to this Court as well.

I think I'm required to ask for permission to argue against settled precedent here because you have ruled very clearly with regard to direct filing of complaints in this court. And I would like to make some --

THE COURT: Take another shot.

MR. THOMPSON: Thank you. Judge, we heard your ruling and we've looked at it in a way that we think that we could proposal to you and to the clerk's office a means by which the burden to the clerk would not be improved or enhanced but that in fact it would allow this court and this office to in fact receive the four hundred dollar filing fee. If I go down to South Carolina to the clerk in Charleston division and file a complaint which will later be put into the JPML and transferred into this court, I will pay that clerk in Charleston four hundred dollars.

THE COURT: The clerk has to kick most of that back to Washington anyway.

MR. THOMPSON: But the clerk gets credit for that filing. That case will be sent here and the clerk will enroll it and put it on the Pacer and do those machinations as well.

Judge, our proposal would be that we have -- in fact, on our side, we have several residents of Westchester as co-leads and as liaison counsel. And one option would be to have those persons in essence be required to comply with all the local rules and all the filing rules with regard to physical filing and bring that case to the court for physical filing so that it would not be some effort for electronic filing, and that that filing fee could be paid into this court and that this court would have an opportunity to hold onto it if it wants to.

THE COURT: Here's the problem. I actually checked because I guess somebody was talking to Judge Smith's chambers about this subject even though I thought I had made myself clear last time. And I checked on this issue of do we get credit if a case is filed elsewhere and transferred here and we do according to the MDL Panel. The money is, as I said, Washington gobbles up most of that.

The main issue I have, and this is because even though we're a big court in a metropolitan area, we are in the Dark Ages in some aspects of our clerk's office operation, and

although I am told that at some point in the foreseeable future we will no longer be manually opening cases, people still do that both here and in Manhattan. That's the problem. A flood of hundreds of cases is just going to bring everybody to a halt. If we were doing it like more of our technologically advanced sister courts where the lawyers upload everything it would be very different. But our court has been rather conservative in terms of doing things electronically and we're catching up to other people. And given the personnel shortages in our clerk's office, where we've had to get rid of people, which is awful, we just don't have the bodies, literally. Because as I said, this doesn't reflect well on the speed with which we have gotten ourselves into the 21st Century, but if Mr. Kekatos walked the case over to the clerk's office, there's still somebody who is going to spend an hour or 20 minutes or whatever it takes inputting stuff and it's just too many cases and too few people.

I adhere to my ruling. Should we join the 21st Century, we can revisit. Maybe in a few months time we'll be up to speed. And it wouldn't be bad, it probably would be a lot easier if the lawyers were doing all the work that our clerk's office is currently doing. But right now we're not going to have direct filing.

MR. THOMPSON: Thank your Honor.

THE COURT: All right. Anything else for today?

MS COOK: Your Honor, two things I wanted to raise. One is I wanted to make sure that your Honor was aware of the recent ruling by the JPML denying transfer of several cases that did not involve injuries related to perforations.

THE COURT: Yes, I saw that.

MS COOK: Okay. And the other issue I wanted to raise is just sort of one of's next steps. Yesterday we were before Judge Martinotti. Andfor the next conference, what he told us to work on in addition to finishing up our ESI discussions and starting to move forward with discovery is negotiating a deposition protocol since under the plaintiffs' proposal, which I'm not sure if you adopted these preliminary deadlines they proposed, but they had proposed a deadline for 30(b)(6) depositions of November 1st. So it looks like depositions of Bayer personnel will be starting in the near future and certainly before the conference after the next one, so if we could discuss a deposition protocol at the next conference that would be helpful.

THE COURT: Yes. What would you just generally be covering in that protocol?

MS COOK: The deposition protocols generally cover the length of depositions, coordination between the state jurisdictions and the MDL, limitations on taking additional depositions of witnesses, cross-noticing depositions, number of questioners for each side who can attend the deposition, other

issues like that. And yesterday with Judge Martinotti, we said that we would put together a draft and send it over to the plaintiffs in the near future and start the phone calls.

THE COURT: Yes. That sounds like a good idea. Because I do intend to adopt the dates that plaintiff suggested that precede the start of generic and case-specific fact discovery. So hopefully you can get to yes. If you can't, either Judge Smith or both of us will take you up at the next conference.

Can you, Ms Cook, send me a proposed order with the discovery schedule we talked about today, which is essentially plaintiffs' but with the tweak that we discussed. I will enter that. I will enter the plaintiffs' fact sheet order and we have a proposed order regarding the defendants fact sheet and I think we can enter that one too.

MS COOK: Your Honor, one question about one of the preliminary deadlines in the plaintiffs' schedule. They have a deadline of October 1st for the deadline for the production of the first fourteen custodians and other initial document production. I'm not sure what that last part means. And I'm also not sure if we'll be ready to produce, for example, all of the databases that we've discussed. So I would prefer to just end it at the custodians, and we'll do a rolling production of the databases as we are able. There are continuing discussions with them about the format and other things of those databases.

THE COURT: I think it's reasonable to give you more time to do a rolling production but should we put a date in somewhere about when that's going to end? Mr. Ronca, did you want to say something?

MR. RONCA: I was just getting ready in case I needed to say something.

THE COURT: October 1st as the deadline for the first fourteen and I don't know, December 1 for remainder of discovery, does that sound reasonable?

MS COOK: Yes, your Honor. That would be fine.

THE COURT: Remaining paper discovery.

MS COOK: I would say the remaining initial document production becasue we may get additional requests.

MR. RONCA: And we don't have an agreement yet on the scope of what we're going to get. We're going to work on that. And I assume that's one of the things we can talk to Magistrate Judge Smith about?

THE COURT: Yes.

THE COURT: All right, have we exhausted ourselves for our agenda? Thank you all very much. Enjoy the rest of the summer if you can. I'm going to hang up to those folks on the phone. Take care.

(Proceedings adjourned)